Supreme Court of the United States

OCTOBER TERM, 1965

No. 280

PASQUALE J. ACCARDI, ET AL., PETITIONERS

vs.

THE PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

[fol. A]

[File Endorsement Omitted]

* * * *

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 29022

Index No. 64 Civ. 238

PASQUALE J. ACCARDI, JACOB GRUBESICK, ALFRED J. SEEVERS, ANTHONY J. VASSALLO, ABRAHAM S. HOFFMAN, and FRANK D. PRYOR, PLAINTIFFS-APPELLEES

against

THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT-APPELLANT

DEFENDANT-APPELLANT'S APPENDIX—filed September 10, 1964

STATEMENT UNDER RULE 15(b)

The above entitled action was commenced in the United States District Court for the Southern District of New York by the filing of the plaintiffs' complaint on January 23, 1964. The defendant, The Pennsylvania Railroad Company, was served on January 27, 1964. On March 13, 1964, attorneys for the respective parties entered into a stipulation of facts for the purpose of making cross-motions for summary judgment. The defendant moved for summary judgment by Notice of Motion dated March 18, 1964, and the plaintiffs cross-moved for summary judg-
[fol. 2] ment by Notice of Motion dated April 16, 1964. The motion was duly heard by Hon. Charles M. Metzner

on April 21, 1964. On April 29, 1964 Judge Metzner filed an opinion denying the defendant's motion for summary judgment and granting the plaintiffs' motion for summary judgment, with directions to settle order. Accordingly, the parties exchanged proposed judgments on May 12 and 15, 1964, respectively, and on June 1, 1964 (entered June 8, 1964) the Court below granted judgment in favor of each plaintiff in the amount of $1,403.10, representing the undisputed amount in suit together with interest thereon at 5% from November 1, 1961. The defendant filed its Notice of Appeal on June 10, 1964, and docketed the Record in this Court on June 26, 1964.

Since the stipulation between the parties sets forth all relevant facts, the Complaint and Answer are omitted from this Appendix. Jurisdiction of the Court below, which is predicated on section 9(d) of the Selective Training and Service Act of 1940, as amended, 50 U.S.C. App. § 459(d), is not challenged.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.—March 18, 1964

SIR:

PLEASE TAKE NOTICE that upon the annexed stipulation entered into March 13, 1964, and the annexed affidavit of A. E. Myles sworn to the 16th day of March, 1964, the defendant, The Pennsylvania Railroad Company, hereby moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing the com- [fol. 3] plaint and for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that the defendant will bring the above motion on for hearing in Room 506, The United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 21st day

of April, 1964, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard.

PLEASE TAKE FURTHER NOTICE that all opposing affidavits and answering memoranda shall be served not later than the 16th day of April, 1964, pursuant to Rule 9(c)(2) of the General Rules of the United States District [Court] for the Southern District of New York.

Dated: New York, N. Y., March 18, 1964.

Yours, etc.,

CONBOY, HEWITT, O'BRIEN & BOARDMAN
Attorneys for the Defendant

By EDWARD F. BUTLER
EDWARD F. BUTLER
A Member of the Firm

To:

ROBERT M. MORGENTHAU, Esq.
United States Attorney
Southern District of New York
Attorney for Plaintiffs.

JAMES G. GREILSHEIMER, Esq.
Special Assistant U. S. Attorney

[fol. 4]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STIPULATION, DATED MARCH 13, 1964.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, attorneys for the respective parties hereto, that the following facts may be deemed to be true for any purpose connected with this action, and for no other purpose whatsoever; but that the agreement of a party to the truth of any matter herein does not waive its objections as to the materiality or relevance of such matter to any issue involved in this action.

FIRST. The defendant, The Pennsylvania Railroad Company, is an interstate carrier by rail, existing under and by virtue of the laws of the Commonwealth of Pennsylvania, doing business within the State of New York and within the jurisdiction of this Court, and is subject to the Railway Labor Act, 45 U.S.C.A. §§ 151 *et seq.*

SECOND. Each of the plaintiffs herein is a former employee of the defendant who was employed by the defendant as a "fireman" or "oiler" on tug boats owned and operated by the defendant in the Port of New York as part of its rail service.

THIRD. The plaintiffs were first employed by the defendant in the capacity of fireman on defendant's tug boats in the Port of New York on the dates set forth below next to their names in column (a) hereof, from which dates their respective seniority as fireman has at all times been measured. The plaintiffs continued in their said employment until each of them left his position to enter the military service on the date indicated below next to his name in column (b). Each of them entered the armed forces on the date indicated in column (c) and served until the date indicated in column (d) when he was honorably discharged. Within 90 days after discharge each of the plaintiffs duly applied for reinstatement to his former position, or to a position of like status, seniority and pay;

[fol. 5] and on the date set forth below next to his name in column (e) hereof, each of the plaintiffs was duly reinstated to such position, his seniority being measured from the corresponding date in column (a).

Plaintiff	*First Employed (Seniority) (a)*	*Left for Military Service (b)*	*Entered Military Service (c)*	*Discharged from Military Service (d)*	*Restored to Defendant's Employment (e)*
Accardi	2/28/41	10/ 3/42	10/ 9/42	10/20/45	1/ 7/46
Grubesich	1/12/42	9/14/42	9/18/42	12/ 8/45	1/ 9/46
Seevers	10/20/41	4/19/42	4/23/42	11/10/45	11/29/45
Vassallo	9/ 3/42	11/10/42	11/16/42	12/ 8/45	1/14/46
Hoffman	7/ 2/42	1/11/43	1/12/43	1/ 9/46	2/11/46
Pryor	7/23/41	7/16/42	7/23/42	12/14/45	1/ 7/46

FOURTH. At the time that each of the plaintiffs was reemployed by the defendant, and prior to December 2, 1960, the defendant accorded to each of the plaintiffs all the rights to which he was entitled by the Selective Training and Service Act of 1940.

FIFTH. Prior to December 2, 1960, no collective bargaining agreement applicable to the plaintiffs contained any provision dealing with the abolition of a class of employee, or with discharge of employees other than for cause.

SIXTH. On June 10, 1959, the defendant and nine other rail carriers operating marine craft in the Port of New York abolished the craft and class of fireman, oiler or oiler/fireman on diesel tugs. The Transport Workers' Union (hereinafter referred to as TWU) and other affected unions called a strike. The carriers obtained an injunction forbidding the strike pending the exhaustion of the settlement procedures of the Railway Labor Act, and were themselves enjoined pending such exhaustion of remedies from discharging oilers or firemen.

[fol. 6] SEVENTH. On December 2, 1960, the defendant and six other rail carriers involved in said labor dispute entered into an Agreement of that date with the TWU, designed in good faith to settle the controversy arising out

of the carriers' abolition of the fireman or oiler classification. The said Agreement of December 2, 1960 (annexed hereto as Exhibit "A", and incorporated herein by reference), was "interpreted" by a Letter Agreement dated December 12, 1960 (annexed hereto as Exhibit "B", and incorporated herein by reference).

EIGHTH. Pursuant to the said Agreements, each of the plaintiffs herein was discharged on December 31, 1960, and his seniority was terminated as of that date. Each of the plaintiffs received a separation allowance, the amount of which was determined by the length of his compensated service with the defendant. The separation allowance was in addition to vacation pay. The number of years of compensated service, and the amount of the separation allowance actually received by each of the plaintiffs, is set forth below next to his name in columns (f) and (g) respectively. The parties agree that if a separation allowance based upon length of compensated service, which ignores time spent in the armed forces, is permissible under the Selective Training and Service Act of 1940, the amount credited to each such plaintiff is correct and the defendant should have judgment. But the plaintiffs do not admit that the separation allowance provided in this collective bargaining agreement, which ignores time spent in the armed forces, is lawful under the said act with respect to them, as veterans.

[fol. 7]

Plaintiff	*Length of Compensated Service (Years) (As of Dec. 1, 1960)* *(f)*	*Separation Allowance Paid* *(g)*
Accardi	17	$3,934.90
Grubesich	16	3,520.70
Seevers	16	3,520.70
Vassallo	15	3,106.50
Hoffman	15	3,106.50
Pryor	16	3,520.70

NINTH. The parties agree that had the plaintiffs not entered the armed forces, and had they continued to render compensated service to the defendant throughout their

respective periods of military service, the separation allowance to which each of them would have been entitled pursuant to the said Agreement would have been based upon the period set forth below next to his name in column (h); and each of the plaintiffs would have been entitled to a separation allowance in the amount set forth below opposite his name in column (i), and would be entitled to judgment against the defendant in the amount of $1,242.60.

Plaintiff	*Seniority as of December 31, 1960 (To Nearest Month) (h)*	*Separation Pay Based Upon Compensated Service and Military Service (i)*
Accardi	19 yrs. 9 mos.	$5,117.50 [*sic*; $5,177.50]
Grubesich	19 yrs. 0 mos.	4,763.30
Seevers	19 yrs. 2 mos.	4,763.30
Vassallo	18 yrs. 4 mos.	4,349.10
Hoffman	18 yrs. 6 mos.	4,349.10
Pryor	19 yrs. 5 mos.	4,763.30

TENTH. If the Court holds that the Selective Training and Service Act of 1940 required an agreement providing for a separation allowance based upon length of compen- [fol. 8] sated service to include time spent in the armed forces as a part of such period, the parties agree that each of the plaintiffs would be entitled to judgment against the defendant in the amount of $1,242.60. But the defendant denies that the Act requires it to include years spent in the armed forces in computing the separation allowance under said Agreement, or that the plaintiffs are entitled to any credit for such period.

ELEVENTH. Of the six plaintiffs, only the plaintiff Accardi was entitled to elect whether to remain in the defendant's employment by reason of his having had more than nineteen years six months seniority as of December 31, 1960, in accordance with the Agreement of December 2, 1960, as interpreted. Accardi did not elect to continue in the defendant's employment prior to December 23, 1960, as required by the said Agreement, nor did he attempt to do so at any subsequent time.

Dated: New York, N. Y., March 13, 1964.

ROBERT M. MORGENTHAU
United States Attorney
For the Southern District of New York

By JAMES G. GREILSHEIMER
Special Assistant Attorney
Attorney for the Plaintiffs

CONBOY, HEWITT, O'BRIEN & BOARDMAN

By EDWARD F. BUTLER
EDWARD F. BUTLER
A Member of the Firm
Attorneys for the Defendant

[fol. 9]

EXHIBIT A, TO STIPULATION

AGREEMENT

This Agreement made this 2nd day of December, 1960

by and between

THE BALTIMORE AND OHIO RAILROAD COMPANY
THE BUSH TERMINAL RAILROAD COMPANY
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
THE LEHIGH VALLEY RAILROAD COMPANY
THE NEW YORK CENTRAL RAILROAD COMPANY
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
THE PENNSYLVANIA RAILROAD COMPANY

REPRESENTED BY THE NEW YORK HARBOR CARRIERS' CONFERENCE COMMITTEE

and

THE TRANSPORT WORKERS' UNION OF AMERICA, RAILROAD DIVISION LOCAL 1463, AFL-CIO

AS THE REPRESENTATIVE OF

THE EMPLOYEES OF SUCH CARRIERS IN MARINE SERVICE IN NEW YORK HARBOR, IN CLASSIFICATIONS KNOWN AS UNLICENSED ENGINEROOM PERSONNEL

[fol. 10] The positions variously designated as "fireman", "oiler" or "oiler/fireman" (all hereinafter referred to as Oiler) on Diesel-powered tug boats in New York Harbor, are abolished effective at the termination of each tour of duty December 31, 1960, subject to the terms and conditions hereinafter set forth.

1—A regularly assigned Oiler whose position is abolished shall receive a separation allowance based upon the following schedule:

Dated: New York, N. Y., March 13, 1964.

ROBERT M. MORGENTHAU
United States Attorney
For the Southern District of New York

By JAMES G. GREILSHEIMER
Special Assistant Attorney
Attorney for the Plaintiffs

CONBOY, HEWITT, O'BRIEN & BOARDMAN

By EDWARD F. BUTLER
EDWARD F. BUTLER
A Member of the Firm
Attorneys for the Defendant

[fol. 9]

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1—A regularly assigned Oiler whose position is abolished shall receive a separation allowance based upon the following schedule:

Length of Compensated Service	*Amount of Allowance Based Upon 40-Hour Week*
6 years	6 weeks
7 years	7 weeks
8 years	8 weeks
9 years	9 weeks
10 years	10 weeks
11 years	22 weeks
12 years	24 weeks
13 years	26 weeks
14 years	28 weeks
15 years	30 weeks
16 years	34 weeks
17 years	38 weeks
18 years	42 weeks
19 years	46 weeks
20 years	50 weeks

Note: A month of compensated service is any month in which the employee worked one or more days; a year of compensated service is 12 such months or major portion thereof. In computing length of compensated service, only service as an Engineer or Oiler with one carrier shall be counted.

An extra or furloughed Oiler of a carrier shall be eligible to receive said separation allowance provided he earned at least $2600 as an Oiler and/or Engineer in the employ [fol. 11] of said carrier during the period of June 15, 1958 to and including June 14, 1959.

2—An Oiler with 20 or more years of seniority as an Oiler as of December 1st, 1960, with one of the carriers signatory hereto may at his option elect to remain in the employment of the carrier in lieu of the separation allowance provided for subject to the following terms and conditions:

(a) An Oiler who elects to remain in the employment of the carrier in lieu of acceptance of said separation allowance shall continue his employment until death, dismissal for cause, resignation, retirement or attainment of age 65. It is understood that in no event will the number of positions available as a result of

the exercise of the option herein described exceed the number of Oilers who elect to remain in the employment of the carrier or the number of regularly assigned positions in existence on December 1, 1960, whichever is the lesser.

(b) A roster of oilers shall be established as of January 1, 1961, which shall include all employees holding seniority rights as Oilers with 20 years or more Oiler's seniority as of such date, and the terms of the Schedule Agreement shall apply to them.

(c) Vacancies arising for any reason whatsoever shall not be filled except to the extent that retained Oilers not working exercise their recall seniority rights under the Schedule Agreement.

(d) Such Oiler accepting the separation allowance herein provided for terminates his employment relationship and all seniority rights as an Oiler December 31, 1960.

[fol. 12] 3—Seniority rights and employment relationship of an Oiler with less than 20 years of seniority are terminated as an Oiler December 31, 1960.

4—An Oiler with 20 years or more of seniority with one of the carriers signatory hereto must notify his employing officer in writing on or before December 23, 1960, as to whether he elects to take the separation allowance provided for herein or elects to remain in the employment of the carrier; the exercise of such election is irrevocable. If an Oiler fails to so notify his employing officer, the carrier may then determine whether the Oiler is to be granted a separation allowance or to be retained in the employment of the carrier.

5—No Oiler shall be eligible for more than one allowance hereunder, nor shall the separation allowance payable to any Oiler under this agreement in any event exceed the sum of money said Oiler would have earned had he continued to work until attainment of age 65.

6—Oilers whose seniority rights and employment relationship are terminated in accordance with the terms of this agreement shall be entitled to vacation allowances in accordance with the applicable vacation rules or agreements, payable in January, 1961.

7—An Oiler holding seniority as an Engineer who remains in service under Section 2 of this agreement must, to the extent that there is a position of an Engineer available, exercise his seniority as an Engineer.

8—An Oiler with 20 or more years of seniority who is off duty on account of sickness or accident at the time this agreement becomes effective will be en-

[fol. 13] titled to the option provided for in Section 2 hereof provided he does so within 10 days after returning for duty.

9—The present operation of the New York Central Railroad Company makes the present application of this agreement to that carrier impracticable. It is agreed, however, that the principles adopted in this agreement will govern the dieselization of the New York Central Railroad Company. As dieselization proceeds, the parties will endeavor to accommodate the principles adopted herein to the successive steps of dieselization. The carrier shall not be required to provide any benefits more extensive or relatively more expensive than those provided herein. Neither shall the union be required to accept conditions less favorable to the affected employees. Should the parties fail to reach agreement, then, at the request of either party, the matter shall be submitted to arbitration in accordance with Paragraph 10 of this Agreement.

10—In the event that any dispute or controversy arises concerning the interpretation, application or enforcement of any of the provisions of this agreement, which are not settled by the authorized representatives of the parties hereto, it may be referred, by either party, to an Arbitration Board selected in the following manner: One (1) member to be selected by the representatives of the employ-

ees and one (1) member to be selected by representatives of the carriers. These two shall endeavor by agreement within ten (10) days after their appointment to select the third arbitrator. In case they are unable to reach agreement within ten (10) days, the National Mediation Board will be
[fol. 14] requested to appoint such third arbitrator in accordance with the provisions of the Railway Labor Act, as amended, who shall be the Chairman of the Board. The expenses, other than those of the neutral arbitrator, shall be paid by the party incurring them, including the compensation of the member of the Board of Arbitration selected by such party.

SIGNED AT NEW YORK, N. Y., THIS 12th DAY OF DECEMBER, 1960.

FOR THE CARRIERS:

NEW YORK HARBOR CARRIERS' CONFERENCE COMMITTEE

/s/ J. J. Gaherin
Chairman

/s/ J. C. Hilly

/s/ W. A. Smith

/s/ F. Diegtel

/s/ P. J. Ellis

/s/ W. G. Chase

/s/ C. E. Alexander

FOR THE EMPLOYEES:

TRANSPORT WORKERS UNION OF AMERICA, RAILROAD DIVISION LOCAL 1463, AFL-CIO

/s/ Henry Hengartner
Executive Secretary, Railroad Division Local 1463, AFL-CIO

/s/ Thomas V. Flynn
International Representative, TWU

/s/ Eugene V. Attreed
Vice President, TWU and Director Railroad Division Local 1463, AFL-CIO

[fol. 15]

EXHIBIT B, TO STIPULATION

NEW YORK HARBOR CARRIERS' CONFERENCE COMMITTEE
ROOM 1050—342 MADISON AVE., NEW YORK 17, N. Y.

December 12, 1960

Mr. Henry Hengartner, Executive Secretary
Railroad Division Local No. 1463,
Transport Workers' Union of America, AFL-CIO

Dear Sir:

This will confirm the following understandings reached in conference on December 2, 1960, in connection with the Agreement of December 2, 1960, dealing with abolishment of Diesel Tug Boat Oilers' positions:

SECTION 1

In the application of the agreement entered into today, it is understood and agreed that an Oiler who was absent during the qualifying period referred to in Section 1 thereof because of an injury sustained in the course of his employment will be given credit for such lost time in computing qualifying period referred to above.

With respect to Oilers who were off duty due to illness during the aforesaid period, the parties will examine and consider such cases individually when and if they are presented by the representatives of the organization.

SECTION 2

An Oiler who has achieved more than 19 years and 6 months of seniority as an Oiler as of December 1, 1960, shall be deemed to have "20 or more years of seniority" as that term is used in Section 2 of the agreement.

[fol. 16]

SECTION 9

In reference to Paragraph 9 of Agreement between Transport Workers Union and the Carriers represented by the New York Harbor Carriers' Conference Committee, dated December 2, 1960—copy of which is attached hereto and made a part hereof:

It is understood and agreed that when the present Diesel tug boat is put into service by said carrier, the following terms will become effective:

(a)—If the Diesel tug boat is placed into service as a regular boat, the railroad will advertise only two shift positions of Oilers and need not fill the third shift positions nor provide rest day relief for the first two positions nor fill vacancies of the first two positions of Oilers.

(b)—If the Diesel tug boat is placed into service as an extra boat, Oilers will be assigned as follows:

Three shifts in a 24-hour period—one (1) Oiler on each of two shifts.
Two shifts in a 24-hour period—one (1) Oiler on one shift.
One shift in a 24-hour period—no Oiler.

In consideration of the above, the carrier agrees that its representative will meet with the organization's representatives to review the present roster in relation to the number of extra men carried thereon, and endeavor to reach an understanding as to the regulation of such roster in a manner that will not adversely affect the operation of the carrier and will achieve as practicable as possible an equal distribution of the work performed by the extra men.

Yours very truly,

/s/ J. J. Gaherin
Chairman, New York Harbor Carriers' Conference Committee

ACCEPTED:

/s/ Thomas V. Flynn

[fol. 17]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF A. E. MYLES, IN SUPPORT OF DEFENDANT'S MOTION

COMMONWEALTH OF PENNSYLVANIA)
) ss.:
COUNTY OF PHILADELPHIA)

A. E. MYLES, being duly sworn deposes and says:

1. I am the Manager of Labor Relations of the defendant, The Pennsylvania Railroad Company, and as such am the chief operating officer of the defendant designated to handle labor disputes arising under the Railway Labor Act, within the meaning of Section 3 First (i) thereof, 45 U.S.C.A. Section 153 First (i), and make this affidavit in support of the defendant's motion for summary judgment herein.

2. I was appointed Manager of Labor Relations (system wide) on October 1, 1963. Prior to said date, and since November 1, 1958, I was Assistant Manager of Labor Relations (system wide). I have been intimately connected with the labor relations of the defendant, The Pennsylvania Railroad Company, since October 15, 1948, when I became Supervisor of Personnel—Labor and Wage Bureau, Western Region, Chicago, Illinois. Thereafter, on November 1, 1955, I became Superintendent of Personnel—Buckeye Region, Cincinnati, Ohio, at which post I remained until I was appointed Assistant Manager of Labor Relations (system wide) on November 1, 1958.

3. The Agreement of December 2, 1960, between the defendant and the Transport Workers' Union of America, was the first agreement, applicable to the class of employee of which these plaintiffs were members, or to any other class of employee of the defendant, which provided for the payment of a separation allowance upon the termination of employment. Prior to that date, no such provision was contained in any agreement to which the de-

fendant was a party applicable to the plaintiffs of any other employees of the defendant.

[fol. 18] 4. The Agreement of December 2, 1960, applicable to the plaintiffs in this action, was a good faith settlement of a pending labor dispute between the defendant and other carriers on the one hand, and the Transport Workers' Union on the other, and was at no time intended by any party thereto to discriminate against either veterans or non-veterans.

5. The foregoing affidavit is made upon my personal knowledge and familiarity with the labor policies and practices of the defendant, and of the negotiations leading to the signing of the Agreement of December 2, 1960, as well as upon review of records of the defendant maintained under my supervision.

[Sworn to by A. E. Myles on March 16, 1964.]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT.—April 16, 1964

PLEASE TAKE NOTICE that upon the annexed stipulation entered into on March 13, 1964, the plaintiffs hereby cross-move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment, and for such other and further relief as may seem just and proper to the Court.

PLEASE TAKE FURTHER NOTICE that the plaintiffs will bring the above motion on for hearing in Room 506, United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 21st day of April, 1964, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard.

Dated: New York, New York, April 16, 1964.

Yours, etc.,

ROBERT M. MORGENTHAU,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiffs,

By JAMES G. GREILSHEIMER,
Assistant United States Attorney.

To:

CONBOY, HEWITT, O'BRIEN & BOARDMAN, Esqs.,
Attorneys for Defendant.

[fol. 19]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION, DATED APRIL 28, 1964, GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.*

APPEARANCES:

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York, Attorney for Plaintiffs; JAMES G. GREILSHEIMER, Assistant United States Attorney, of Counsel.

CONBOY, HEWITT, O'BRIEN & BOARDMAN, of New York, N. Y., Attorneys for Defendant; R. L. Duff, of Counsel.

METZNER, D. J.:

The action seeks relief under the re-employment rights given to veterans § 9 of the Universal Military Training and Service Act, 50 U.S.C. App. § 459. The parties cross-move for summary judgment. There is no dispute as to the facts.

The plaintiffs are former employees of the defendant, the Pennsylvania Railroad. All had left their employment to enter military service. Upon being honorably discharged from service, they were reinstated in their employment with the same seniority, status and pay as had been achieved by those employees who did not enter military service. In December 1960 the Transport Workers Union and defendant entered into an agreement to settle an existing strike. The agreement provided for the abolition of certain positions and payment of separation allowances to the discharged employees based upon their years of compensated service. In computing the amount of separation allowances for these six plaintiffs, they did not receive credit for the years spent in the armed forces. The action seeks recovery of the amounts payable to these plaintiffs with that credit.

The determination of this issue depends upon the construction to be given to section 459. The section provides

* Reported at 229 F. Supp. 193.

[fol. 20] in subdivision (b)(B) that a person honorably discharged from military service shall be re-employed and restored by his employer "to such position or to a position of like seniority, status, and pay". Subdivision (c)(1) provides that any person who is restored to a position in accordance with subdivision (b)(B)

> "shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence. . . ."

The key to the construction of the section is found in subdivision (c)(2) which reads:

> "It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

It was the intent of Congress that the returning veteran

> "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284 (1946).

The escalator principle has been reaffirmed in *Tilton* v. *Missouri Pacific R. R.*, 376 U. S. 169 (1964); *Oakley* v. [fol. 21] *Louisville & Nashville R. R.*, 338 U. S. 278 (1949); *Trailmobile Co.* v. *Whirls*, 331 U. S. 40 (1947).

In *Borges* v. *Art Steel Co.*, 246 F. 2d 735 (2d Cir. 1957), the court was concerned with the right of returned veterans to increases in salary granted by a collective bargaining agreement which by its terms was applicable only

to employees with a specified number of hours of "consecutive working service" immediately preceding the date on which the increase was granted. The agreement defined the consecutive working service as actual service of 1800 hours per year as a minimum calculated on the basis of the employee's straight time hourly earnings. The contract provided that persons on furlough or leave of absence did not accrue consecutive working service. The question before the court was whether the plaintiffs should be regarded as having been on leave of absence, so that they did not meet the standard of "consecutive working service", or whether they should be given equal status with nonveterans who remained continuously on the job.

The court discussed the very problem presented in this case, which is the interpretation of subdivision (b)(B) and (c)(1). How do you differentiate between "seniority," "status," and "pay" on one hand and "other benefits" on the other? The court was faced with its prior decisions holding that vacation pay benefits awarded to fellow employees while the plaintiff was in military service were not available to the latter. *Alvado* v. *General Motors Corp.*, 229 F. 2d 408 (2d Cir. 1956); *Siaskiewicz* v. *General Elec. Co.*, 166 F. 2d 463 (2d Cir. 1948); *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (2d Cir. 1948). The rationale of those decisions was that vacation pay did not go to seniority under (b)(B), but to "other benefits" under (c)(1) and therefore practices as to employees on furlough or leave of absence controlled.

[fol. 22] The court said,

> "While the problem of construction is difficult, it seems most likely that the expression 'insurance or other benefits' was meant to cover a fairly narrow group of economic advantages whose common quality was that they were miscellaneous fringe benefits not usually regarded as part of 'pay,' 'status,' or 'seniority.'" 246 F. 2d at 738.

While vacation pay was held to be of this fringe character, the provision for increase in pay based on actual service of hours per year was held not to be a fringe benefit.

The court allowed the inclusion in "actual service of 1800 hours per year" of the time spent in military service.

In *Seattle Star* v. *Randolph*, 168 F. 2d 274 (9th Cir. 1948), the court was presented with a question of severance pay and found that such pay was a fringe benefit, relying on *Dwyer* v. *Crosby Co., supra*, a vacation pay case. In the *Seattle Star* case the agreement provided that the time spent on leave should not count as service time. The court read this provision in conjunction with subdivision (c)(1), which refers to employees in the armed services as being on leave of absence. The existence of such a provision in the *Borges* case was not even considered by the court in reaching its determination.

In *Hire* v. *E. I. du Pont de Nemours & Co.*, 324 F. 2d 546 (6th Cir. 1963), the court held that a returning veteran who stepped off the escalator to find that fellow employees of like seniority and status had been laid off, given severance pay and placed upon a recall list, was himself entitled to that severance pay.

The question of severance pay does not appear to have arisen in this circuit. However, I am of the opinion that the approach by the court in the *Borges* case and the general purposes underlying the Act call for a ruling here [fol. 23] that subdivision (b)(B) is applicable and that in computing severance pay plaintiffs are entitled to include the time spent in the armed forces.

A reading of the congressional history (86 Cong. Rec. 10914 (Aug. 26, 1940)) indicates that the final form of subdivision (c)(1), with its reference to "leave of absence", was not adopted with any intention to curtail the rights of the veteran. It is obvious that there can be many practical situations where (c)(1) literally applied can negative the "escalator" purpose of the Act.

Defendant argues that since the agreement between itself and the union was entered into more than one year after plaintiffs were restored to their employment, the Act has no application to any rights created by the agreement. Section 9(c) of the Act provides that a veteran who is restored to employment pursuant to section 9(b) "shall not be discharged . . . without cause within one year after such restoration." This right is separate and distinct from the right to be restored to employment in a

position "of like seniority, status, and pay". If the time limitation against discharge without cause were to be read as a limitation on the other benefits created by the Act, it would nullfy [*sic*] its whole purpose, because then the employer and a union could redraw an agreement with impunity after one year from the employee's return from service.

The case of *Trailmobile Co.* v. *Whirls, supra,* relied on by defendant, is not to the contrary. There the issue was whether the preferred benefits given by the Act should inure to the veteran after the one-year period had run, so that he would not only be placed on a par with his non-veteran fellow workers, but would be given additional advantages. In that case the action of the employer was sustained because the same harsh treatment was applied without discrimination between veterans and nonveterans of like seniority.

[fol. 24] Defendant's motion for summary judgment is denied. Plaintiffs' cross-motion for summary judgment is granted. Settle order.

Dated: New York, N. Y.
April 28, 1964

CHARLES M. METZNER
U. S. D. J.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JUDGMENT ENTERED JUNE 8, 1964

Upon the decision of this Court filed on April 29, 1964 in the within suit, whereby defendant's Motion for Summary Judgment was denied and plaintiff's Cross-Motion for Summary Judgment was granted and upon all of the prior proceedings, it is hereby

ORDERED AND ADJUDGED that each of the plaintiffs shall recover judgment against the named defendant, The Pennsylvania Railroad Company, for the sum of $1,242.60, together with interest at the rate of 5% per an-

num from November 1, 1961 through May 22, 1964 in the sum of $160.50 for a total of $1,403.10.

Dated: New York, New York, June 1, 1964

CHARLES M. METZNER
U. S. D. J.
Rec'd in Clerk's Office 6/8/64

JUDGMENT ENTERED 6/8/64
JAMES E. VALECHE
Clerk

[fol. 25]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL.—June 9, 1964

SIR:

PLEASE TAKE NOTICE, that the defendant, The Pennsylvania Railroad Company, hereby appeals to the United States Court of Appeals for the Second Circuit from an order and judgment herein, per Hon. Charles M. Metzner, U.S.D.J., granting judgment for each of the plaintiffs herein, entered in this action on the 8th day of June, 1964.

Dated: New York, New York, June 9, 1964.

Yours, etc.,

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Attorneys for the Defendant.

By /s/ David J. Mountan, Jr.,
A Member of the Firm.

To:

HON. ROBERT M. MORGENTHAU,
Attorneys for the Plaintiffs,
United States Attorney for the
Southern District of New York,
James G. Greilsheimer,
Special Assistant Attorney.

[fol. 26]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 153—September Term, 1964.

Argued November 12, 1964

* * * *

Docket No. 29022

PASQUALE J. ACCARDI, JACOB GRUBESICK, ALFRED J. SEEVERS, ANTHONY J. VASSALLO, ABRAHAM S. HOFFMAN, and FRANK D. PRYOR, PLAINTIFFS-APPELLEES

v.

THE PENNSYLVANIA RAILROAD COMPANY,
DEFENDANT-APPELLANT

Before:

LUMBARD, *Chief Judge*,
SWAN and WATERMAN, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Southern District of New York, Metzner, *J.*, 229 F. Supp. 193, granting claims by veterans against their former employer for sums allegedly due them under 50 U. S. C. App. § 308 (1946). Reversed.

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York (James G. Greilsheimer, Asst. United States Attorney, of counsel), *for Plaintiffs-Appellees.*

[fol. 27]

CONBOY, HEWITT, O'BRIEN & BOARDMAN (R. L. Duff, of counsel), New York City, *for Defendant-Appellant.*

OPINION—January 25, 1965

WATERMAN, *Circuit Judge*:

Plaintiffs, veterans of World War II, brought suit in the United States District Court for the Southern District of New York. They claimed that defendant, their former employer, had denied them that portion of a separation allowance, granted in 1960, to which they were entitled under Section 8 of the Selective Training and Service Act of 1940, 50 U. S. C. App. § 308 (1946). Upon cross motions for summary judgment, Judge Metzner awarded the sums claimed by plaintiffs. His opinion is reported at 229 F. Supp. 193.

Defendant has appealed, arguing that the provisions of Section 8 relied on by plaintiffs does not apply either to separation allowances or to benefits granted more than one year after an employee's return to work from military service. We reverse the district court on the applicability of Section 8 to separation allowances, and therefore we do not reach defendant's alternative ground for reversal. Nor need we discuss defendant's additional contention on appeal that the district court improperly computed the interest owing on the judgment awarded to plaintiffs.

The relevant facts in this case are stipulated. Plaintiffs first entered the employ of defendant in 1941 and 1942 as firemen on tugboats in New York harbor. They left their jobs during World War II to serve in the armed forces, but at the close of the war they were reinstated in their former positions. Thereafter, they worked continuously as tugboat firemen for defendant until 1960. In December of that year, defendant and the union which represented plaintiffs reached an agreement designed to settle a bitter dispute over reduction of work forces in connec- [fol. 28] tion with the transition from steam-powered to diesel-driven tugs. The contract abolished the job of fire-

man on the diesel tugs but awarded the displaced employees separation allowances that varied in amount according to each employee's "length of compensated service." Plaintiffs were permanently separated from defendant's employ pursuant to the contract, and, in computing their separation allowances, defendant credited them only with time actually spent in its employ for which they received wages.

This suit arises out of plaintiffs' claim that defendant should have included their years in the armed forces in calculating the separation allowances. Plaintiffs do not content that the phrase "compensated service" was intended by defendant and the union to encompass military service. Rather, they argue that Section 8 of the Act requires that they be credited with their years in the armed forces, regardless of the intent of the parties to the agreement. Plaintiffs are correct in assuming that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285 (1946). The problem presented by this case is that of whether the statute dictates that military service should have been included in "compensated service," irrespective of the intent of union and employer in choosing that language.

Section 8(b)(B) of the Act requires that a private employer restore a returning veteran "to [his former] position or to a position of like seniority, status, and pay . . ." Section 8(c) further provides:

> Any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of [fol. 29] training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the

> time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

If the separation allowances granted to plaintiffs in 1960 come within the statutory concepts of "seniority, status, and pay," plaintiffs are entitled to be treated as if they had kept their positions continuously during World War II. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, at 284-85. On the other hand, if the allowances constituted "insurance or other benefits," plaintiffs are not entitled to be credited with their years in the armed forces, for, with certain immaterial exceptions, the agreement between defendant and the union did not treat time spent by employees "on furlough or leave of absence" as "compensated service."

There are no decisions in this circuit or in the Supreme Court determining whether separation allowances are included within the categories of "seniority, status, and pay" or of "insurance or other benefits." However, in *Borges* v. *Art Steel Co.*, 246 F. 2d 735, 738 (2 Cir. 1957), we drew the line between the two categories as follows:

> While the problem of construction is difficult, it seems most likely that the expression "insurance or other benefits" was meant to cover a fairly narrow group of economic advantages whose common quality was that they were miscellaneous fringe benefits not usually regarded as part of "pay," "status," or "seniority."

[fol. 30] In *Borges*, we ruled that "wage increases were in no sense fringe benefits, but became a regular part of the jobholder's pay or status, swelling his pay check every week he worked in the future . . ." *Id.* at 738-39. On the other hand, in *Siaskiewicz* v. *General Elec. Co.*, 166 F. 2d 463, 465-66 (2 Cir. 1948), we decided that "since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of 'other benefits'." Accord, *Alvado* v. *General Motors Corp.*, 229 F. 2d 408, 410-11 (2 Cir. 1956), *cert. denied*, 351 U. S. 983; *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (2 Cir. 1948).

With some doubts, we hold that the separation allowances in the present case are properly "other benefits" rather than includable within "seniority, status, and pay." Unlike the wage increases in *Borges*, they did not become a regular part of plaintiffs' earnings, and, like the vacation rights in *Siaskiewicz*, they were neither pay for work actually done nor a traditional perquisite of seniority. On the contrary, they seemingly constituted only a miscellaneous benefit, devised *ad hoc* after intensive collective bargaining in order to serve a transitory purpose. We are confirmed in this conclusion by the decisions of two other Courts of Appeals. *Hire* v. *E. I. du Pont de Nemours & Co.*, 324 F. 2d 546, 549-50 (6 Cir. 1963); *Seattle Star, Inc.* v. *Randolph*, 168 F. 2d 274 (9 Cir. 1948). There are no appellate decisions to the contrary.

Reversed.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. THOMAS W. SWAN,
HON. STERRY R. WATERMAN,
Circuit Judges.

PASQUALE J. ACCARDI, JACOB GRUBESICK, ALFRED J. SEEVERS, ANTHONY J. VASSALLO, ABRAHAM S. HOFFMAN, FRANK D. PRYOR, PLAINTIFFS-APPELLEES

v.

THE PENNSYLVANIA RAILROAD COMPANY,
DEFENDANT-APPELLANT

JUDGMENT—January 25, 1965

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

* * * *

[fol. 32]

[File Endorsement Omitted]

[fol. 33]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 34]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1964

[Title Omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 27, 1965

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including June 21, 1965.

/s/ John M. Harlan
Associate Justice of the
Supreme Court of the United States

Dated this 27th day of April, 1965

[fol. 35]

SUPREME COURT OF THE UNITED STATES

No. 280, October Term, 1965

PASQUALE J. ACCARDI, ET AL., PETITIONERS

v.

THE PENNSYLVANIA RAILROAD COMPANY

ORDER ALLOWING CERTIORARI.—October 11, 1965.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 791033 288